

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
PEERY/ARRILLAGA)
For Review of a Decision of the)
Santa Clara Water District)
Regarding Costs Imposed Under)
the Underground Storage Tank)
Local Oversight Program.)
Site No. 52D)

ORDER NO. CWP 92-01-CWP

BY THE BOARD:

Peery/Arrillaga (Petitioner), seeks review of certain actions of the Santa Clara Valley Water District (District) and the Division of Clean Water Programs (Division) taken in connection with the Local Oversight Program operated by the State Water Resources Control Board (Board).

Specifically, Petitioner seeks review of actions related to recovery from Petitioner of oversight costs associated with unauthorized releases from underground storage tanks at a site owned by the Petitioner. The costs involved can be summarized as follows:

1. District Program Development Costs
(Also Known as Start Up Costs) \$ 3,359.47
2. District Program Implementation Costs 11,580.41
3. District Site Specific Costs
(Includes Travel Time) 11,424.78

4. Regional Board Technical Service

Costs	<u>2,770.11</u>
	TOTAL \$29,134.77

Although the Petitioner has raised a number of issues relative to the validity of assessment of these charges to the Petitioner, the primary contention of the Petitioner is that the Board has no authority to recover these charges.

As will be more fully discussed hereafter, reimbursement for the costs in question was provided by the Board to the District pursuant to Section 25297.1 of the California Health and Safety Code as that section stood prior to January 1, 1990. Section 25297.1 was repealed by its own terms on January 1, 1990.¹ We have concluded that repeal of Section 25297.1 as of January 1, 1990 acted to nullify the Board's authority to proceed under that section, including nullification of the Board's authority to recover the disputed costs involved in this matter or to finally determine the reasonableness of the charges assessed to the Petitioner. Legal authority to collect the disputed costs in this case is now vested solely with the Attorney General of this state pursuant to the provisions of Section 25360 of the Health and Safety Code.

¹ Section 25297.1 was significantly modified and reenacted during 1990. The reenacted version of Section 25297.1 became effective as of January 1, 1991. Unless otherwise specifically indicated, the discussions of this order pertain to the original version of Section 25297.1 which was repealed as of January 1, 1990.

I. BACKGROUND

Health and Safety Code Section 25297.1 was enacted and became effective on September 28, 1987. Among other provisions, Section 25297.1 authorized the Board, in cooperation with the Department of Health Services (DHS), to develop and implement a Local Oversight Program. The Board was authorized to enter into contracts with local agencies to oversee site cleanup of unauthorized releases from underground storage tanks, to provide funding to the local agencies for the reasonable cost of their oversight activities, to make reasonable efforts to recover costs incurred from responsible parties, and to pursue any legal remedy available for cost recovery purposes. Section 25297.1 contained a sunset clause which provided that the section would be repealed as of January 1, 1989, unless this date was extended by later legislation. The automatic repeal date of January 1, 1989 was subsequently extended to January 1, 1990.² No further extension of the automatic repeal date was provided and Section 25297.1 was effectively repealed as of January 1, 1990.

Funding for the costs assessed to Petitioner's site was provided to the Board through DHS pursuant to the provisions of the Johnston-Filante Hazardous Substance Cleanup Bond Act of 1984. (Health and Safety Code Section 25385 et seq.) That Act provides that proceeds from the sale of bonds are to be deposited in the Hazardous Substance Cleanup Fund and are

² See Stats. 1988, c. 1431, Section 1, approved September 26, 1988, filed September 27, 1988, effective immediately.

available for specified purposes pursuant to appropriation by the Legislature. Section 25360 of the Health and Safety Code also provides that all costs incurred and payable from the Hazardous Substance Cleanup Fund are to be recovered from the liable person or persons by the Attorney General.

Bond funds were appropriated by the Legislature to DHS and provided to the Board by way of an interagency agreement dated December 22, 1987.

The interagency agreement called for the Board to enter into contracts with local agencies, with the local agencies to identify and oversee remediation of underground storage tanks at selected sites. The contracts with local agencies were to provide for Board reimbursement to the local agencies for the costs of services rendered by the local agencies. The Board and the California Regional Water Quality Control Boards (Regional Boards) were to provide technical services to the local agencies involved in the Local Oversight Program. The interagency agreement also contained the following provision:

"Whenever a Responsible Party fails to repay all of the costs (attributable to a site) ... the State Board shall request the State Attorney General to bring a civil action to recover those moneys pursuant to Health and Safety Code Section 25360 The State Board shall submit a copy of each referral to the Attorney General to the Toxic Substance Control Division's Legal Services Office."

Pursuant to a reorganization plan which took effect in 1991, the Department of Toxic Substances Control has succeeded the powers and responsibilities of the Toxic Substances Control

Division of the Department of Health Services, including those provided for in the interagency agreement for the Local Oversight Program.

Pursuant to the above-cited statutory and contractual authority, the Board entered into a contract with the District on April 1, 1988, in which the District agreed to provide oversight services for remediation of contaminated sites within its jurisdiction, and the Board agreed to reimburse the District for direct and indirect costs incurred by the District in its endeavors.

On August 17, 1988, the District notified Petitioner, owner of a site known as Site No. 52D, that the District would undertake oversight activities at that site, and that Petitioner would be responsible for all direct and indirect costs of each state and local agency involved in the oversight activities.

The District performed oversight activities at the site under the Local Oversight Program between August 17, 1988 and January 5, 1989. On January 23, 1989, due to groundwater impacts and the complicated nature of the site, the District transferred jurisdiction of the site to the San Francisco Bay Regional Board.

On July 18, 1989, the Division billed Petitioner for the cost of oversight activities at Site No. 52D in the amount of \$29,134.77 and this petition followed.

In addition to the costs just discussed, the Division itself has incurred administrative costs in connection with the Local Oversight Program. These costs are calculated at \$8.86 per

site specific hour on a statewide basis. These costs were billed to the Petitioner on August 27, 1991, and added \$2,532.56 to the oversight costs assessed to Site No. 52D.

II. CONTENTIONS AND FINDINGS

Contention: Petitioner contends that repeal of Section 25297.1 as of January 1, 1990, also served to repeal any right that the Board might have had to recover disputed amounts under that statute. Assuming the correctness of this contention, the Petitioner goes on to argue that it is also questionable whether the Board can recover the costs at issue in this case under the current version of Section 25297.1 since that statute only became effective as of January 1, 1991, and since the statute is not expressly made retroactive to costs expended before that date.

Finding: We concur with the contention that, under the circumstances of this case, repeal of Section 25297.1 as of January 1, 1990 had the effect of depriving the Board of any further right to proceed under that statute. In the absence of a savings clause or statute, repeal of a statute generally has the effect of destroying all future effectiveness of the repealed act. The repeal divests all rights to proceed under the repealed

act on pending matters. That is, any rights, liabilities, penalties, or proceedings which have not been culminated in a final judgment prior to repeal are abated.³ While there are some exceptions to the general rule regarding effect of repeal of statutes, none of the exceptions appear to apply to this case.

Nor does it appear to us that the current version of Section 25297.1 can be retroactively applied to the costs which are the subject of this appeal. Generally speaking, a statute is not deemed to be intended to apply retroactively unless it is expressly made retroactive. No such intent was expressed in the current version of Section 25297.1. Furthermore, there is no legislative history which would tend to indicate that the Legislature intended the provisions of this statute to be applied retroactively. On the contrary, both the Legislative Counsel's Digest relative to the current version of Section 25297.1 and the language of this section seem to speak prospectively rather than retroactively.

Consequently, we are compelled to find that this Board has no legal authority to pursue collection of the disputed amount pursuant to the terms of Section 25297.1, either as that section stood in the past or as it stands at present.

This does not mean that the Petitioner has no obligation to repay the state for the costs involved. As

³ See Sutherland, *Statutes and Statutory Construction*, 4th Edition, 1985 Revision, Volume 1a, Section 23.33; Governing Board of Rialto Unified School Dist v. Mann, 18 Cal.3d 819, 135 Cal.Rptr. 526 (1977); Coombes v. Franklin, 213 Cal. 164, 1 P.2d 992 (1931); Lemon v. Los Angeles Terminal Ry. Co., 38 Cal.App2d 659, 102 P.2d 387 (1940).

previously indicated, Section 25360 of the Health and Safety Code requires the Attorney General to collect all funds paid from the Hazardous Substance Cleanup Fund from liable parties. Our agreement with DHS obligates us to refer all unpaid amounts to the Attorney General for collection.

III. SUMMARY AND CONCLUSIONS

1. The repeal of Section 25297.1 as of January 1, 1990, abated the right of the Board to proceed under that section.

2. The current version of Section 25297.1 only became effective on January 1, 1991, is not retroactive, and cannot be applied to the costs in question in this proceeding.

IV. ORDER

IT IS THEREFORE ORDERED THAT, In the absence of full payment by the Petitioner of all amounts billed to the Petitioner at Site No. 52D within 15 days after adoption of this Order, the Division shall take appropriate steps for reference of this matter to the Attorney General for institution of a civil action to recover such amounts.

CERTIFICATION

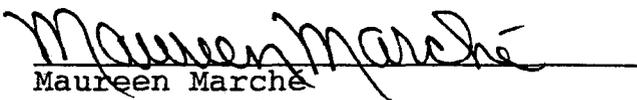
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 23, 1992.

AYE: W. Don Maughan
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant
to the Board